

GENE QUIGLEY, JR.

IBLA 87-453

Decided December 4, 1989

Appeal from a decision of the District Manager, Medford, Oregon, Bureau of Land Management, terminating O&C Logging Road Right-of-Way Permit OR M-1341.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way

A decision to terminate a right-of-way granted pursuant to Title V of the Federal Land Policy and Management Act of 1976 will be set aside where, contrary to the provisions of 43 U.S.C. § 1766 (1982) as implemented by 43 CFR 2803.4(d), a reasonable opportunity to cure noncompliance with the terms of the right-of-way grant was not allowed the right-of-way holder.

APPEARANCES: Gene Quigley, Jr., pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Gene Quigley, Jr., has appealed from an April 17, 1987, decision of the Medford Oregon District Manager, Bureau of Land Management (BLM), terminating O&C Logging Road Right-of-Way permit No. M-1341. On October 8, 1981, BLM approved a right-of-way granting appellant

the right to use roads and rights-of-way across * * * Township 35 South, Range 1 East, Section 26, W\SW^, and in Section 35, W\NW^, Willamette Meridian, Jackson County, Oregon * * * for the purpose of management and removal of timber, other forest products, and ingress and egress from lands which are owned or controlled by permittee as of the time of exercise by permittee of the rights herein granted by the Government.

The October 8, 1981, letter of approval notified appellant to "proceed with road construction if weather conditions permit." The right-of-way was granted for a 20-year period, and was accepted subject to Departmental regulations and conditions specified in Exhibits A, B, C, and D, attached as part of the right-of-way grant. Exhibit A consisted of three pages of special provisions upon which the grant was conditioned. Exhibit B was comprised of an engineer's drawing of the proposed right-of-way showing the location of culverts and ditches, and three pages of construction standards.

BLM's decision terminating the right-of-way referred to conditions in Exhibits A and B, and to provision of 43 CFR 2803.4(b), in support of the decision to void the right-of-way. The decision observed that "[f]ailure of the Permittee to use any right-of-way for the purpose for which it was granted for any continuous five-year period shall constitute a rebuttable presumption of abandonment of that right-of-way." The decision recites also that in March 1985 appellant requested permission to construct the road prior to June 1. This request was denied because of wet soil conditions. At the same time, BLM offered to discuss proposals for use of a different route. The April 17, 1987, decision concludes:

As of this date the road has not been built and it is the opinion of this office that you have failed to perform under the provisions of the permit. Therefore, this decision serves as notification that O&C Logging Road Right-of-Way Permit No. M-1341 is hereby terminated for failure to perform as cited above.

(Decision at 2).

Earlier, on March 26, 1987, BLM had notified appellant that it intended to cancel his right-of-way permit for failure to construct the logging road. A meeting was held between appellant and BLM employees on April 2, 1987, to discuss the matter.

In his statement of reasons (SOR), appellant acknowledges that at the time the right-of-way was approved "[t]he market for the timber dropped drastically which made it economically not feasible to log so I did not build the road at that time" (SOR at 1). Appellant states that in March 1985 he requested permission to construct the road prior to June 1, but that request was denied. Appellant contends:

The BLM indicated that I had the right to proceed with building this road after June 1st but they preferred that I did not do so. I was asked if I would consider trading this property if an acceptable trade could be arranged. I answered yes and agreed not to build the road at this time and was led to believe the time for construction of this right of way would be extended.

(SOR at 1). In June of 1985, appellant explains, he was notified that his road bond was cancelled. He then explained to BLM his difficulty in obtaining the bond and stated that he would like to postpone logging to a later date, as long as he could be assured he would not lose his rightof-way. Otherwise, appellant cautioned, he would have no choice but to construct the road and commence logging. *Id.* BLM's District Manager responded, according to appellant, that appellant could postpone posting a bond until he desired to begin road construction and hauling.

On appeal, appellant contends he has cooperated fully with BLM; has stayed in contact with BLM over the life of his right-of-way; that he was given reason to believe his time for construction would be extended; and he is willing to cooperate to reach a decision that is fair to the parties.

He argues that to terminate the permit will cause hardship and is not necessary, and that to extend the permit would not be harmful to the property affected by the right-of-way (SOR at 2).

[1] Paragraph 8 E of Exhibit A to the permit states: "Failure of Permittee to use any right-of-way for the purpose for which it was granted for any continuous five-year period shall constitute a rebuttable presumption of abandonment of that right of way." The record does not indicate that BLM considered whether appellant had rebutted the presumption of abandonment by his showing concerning contacts with BLM. The applicable statute, 43 U.S.C. § 1766 (1982), provides, pertinently, that:

Abandonment of a right-of-way or noncompliance with any provision of this subchapter, condition of the right-of-way, or applicable rule or regulation of the Secretary concerned may be grounds for suspension or termination of the right-of-way if * * *, the Secretary concerned determines that any such ground exists and that suspension or termination is justified. * * * Prior to commencing any proceeding to suspend or terminate a right-of-way the Secretary concerned shall give written notice to the holder of the grounds for such action and shall give the holder a reasonable time to resume use of the right-of-way or to comply with this subchapter, condition, rule, or regulation as the case may be. Failure of the holder of the right-of-way to use the right-of-way for the purpose for which it was granted, issued, or renewed, for any continuous five-year period, shall constitute a rebuttable presumption of abandonment of the right-of-way for the purpose for which it was granted, * * *.

The regulation implementing the statute provides, relevantly:

(c) Failure of the holder of a right-of-way grant to use the right-of-way for the purpose for which the authorization was issued for any continuous five-year period shall constitute a presumption of abandonment. The holder may rebut the presumption by proving that his failure to use the right-of-way was due to circumstances not within the holder's control.

(d) Before suspending or terminating a right-of-way grant pursuant to paragraph (b) of this section, the authorized officer shall give the holder written notice that such action is contemplated and the grounds therefor and shall allow the holder a reasonable opportunity to cure such noncompliance.

43 CFR 2803.4(c) and (d).

The statutory provision defining the consequences of failure to use a right-of-way therefore appears in the statute, in the Departmental regulation at 43 CFR 2803.4, and in the right-of-way grant at Exhibit A, paragraph 8 E. BLM's decision cites and quotes 43 CFR 2803.4 and states that "as of this date the road has not been built and it is the opinion of this office that you have failed to perform under the provisions of this permit."

The right-of-way grant does not, it is true, contain the statutory or regulatory requirement that a right-of-way holder be afforded a reasonable time to "resume use" or to "cure such noncompliance." Nonetheless, construing the regulation together with 43 U.S.C. | 1766 (1982), we conclude that BLM must give appellant "a reasonable time to resume use of the right of way." Id.

Failure to use the right-of-way for a continuous period of 5 years breaches the right-of-way permit, and violates the regulation (43 CFR 2803.4) and the statute (43 U.S.C. | 1766 (1982)). The words "resume use" appearing in 43 U.S.C. | 1766 (1982), however, refer to conduct leading to a refutation of the statutory presumption of abandonment. Implementing this statutory provision, the regulation at 43 CFR 2803.4 provides that opportunity must be afforded to avoid the presumption of abandonment resulting from non-use. BLM was therefore required to allow appellant a reasonable opportunity to cure his failure to use the right-of-way.

On remand, BLM must give appellant written notice that he has a reasonable time, as determined by BLM, to cure noncompliance with the terms of the right-of-way for which termination is sought or to rebut the presumption of abandonment.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded.

Franklin D. Arness
Administrative Judge

I concur:

David L. Hughes
Administrative Judge